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VIA ECFS

January 5, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Cingular Wireless LLC
Federal-State Joint Board on Universal Service CC Docket No. 96-45, and Access Charge Reform, CC Docket 96-262,
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

Cingular Wireless LLC, by counsel, hereby addresses correspondence arising out of an August 20, 2004 letter (the "OGC Letter") from the Office of General Counsel of the Federal Communications Commission ("OGC") to the Honorable John Ott, the presiding judge in the case of *Martha Self, et al. v. BellSouth Mobility, Inc.*, CV 98-JEO-2581-S, presently before the United States District Court for the Northern District of Alabama. Because the matters referenced in the OGC Letter and the subsequent correspondence relate to the pending reconsideration proceeding, a copy of the instant correspondence is hereby filed in accordance with Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b). By this filing, Cingular seeks to ensure that the underlying record in the rulemaking proceeding is complete and, in this regard, has attached the underlying correspondence for incorporation into the record as well. As will become apparent, the Commission should expeditiously address the important issues raised in BellSouth's petition for reconsideration in order to provide clarification to the *Self* court.

I. BACKGROUND

This matter involves fundamental issues concerning the Commission's federal universal service fund ("USF") and the preemptive scope of Section 332(c)(3) of the Act. Over five years

ago in December 1999, BellSouth Corporation, on its own behalf and that of its wireless subsidiaries (and Cingular's predecessors-in-interest), submitted a petition for reconsideration of the *Sixteenth Order on Reconsideration* in the Commission's universal service proceeding, concurrently with a request for refund of universal service contributions assessed on its subsidiaries' intrastate revenues. BellSouth filed its petition in light of the *Self* litigation. In that litigation, plaintiff contends that the Fifth Circuit's 1999 decision in *Texas Office* precludes all carriers, including CMRS providers, from recovering federal USF contributions through rates for intrastate services. In its petition, BellSouth argued that the Commission's *Fourth Order on Reconsideration* in the universal service proceeding answered this question directly by expressly permitting CMRS providers to recover such costs via rates for all their services – intrastate and interstate alike – and that the *Texas Office* decision left the *Fourth Order on Reconsideration* untouched.[1]

On March 6, 2000, the *Self* court held the case in abeyance pending Commission action on BellSouth's petition. The court found that "resolution of those matters [raised by plaintiff] will necessarily involve a determination of the validity of certain orders and actions of the FCC" and stated further that:

> Upon a close examination of the issues presented herein, the court is absolutely convinced that many of the issues raised herein are appropriately left for resolution by the FCC, which possesses much greater experience in the area of the universal service program. Additionally, staying this matter to allow the FCC to reconsider, clarify, or revise its orders simply makes more sense than diving into the present issues without the direction that hopefully will be forthcoming from the FCC or the United States Supreme Court in the review of the *Texas Counsel* decision.[2]

Judge Ott only recently directed the plaintiffs to submit an amended complaint, which was filed October 28, 2004, and Cingular filed its answer November 17, 2004.

By the OGC Letter, OGC, on Chairman Powell's behalf and in response to a status inquiry from Judge Ott, addressed the status of BellSouth's petition.[3] OGC stated that it believed the issue of CMRS providers' ability to recover costs through rates for all their services had been resolved by prior Commission orders. Specifically, OGC stated that "[t]he FCC issued orders in 2002 and 2003 addressing the" issue raised in the BellSouth petition concerning the significance of the *Fourth Order on Reconsideration* that "appear to address and provide an answer" to that issue. Cingular agreed with OGC that the 2002 and 2003 decisions cited in OGC's letter address the issue. Cingular further believes that these decisions support Cingular's position in the

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1 BellSouth also raised the issue of whether the court's decision in *Texas Office* applied retroactively with respect to USF contributions previously assessed on intrastate revenues, which OGC did not address in its August 20, 2004 letter. The Commission advised that this issue would likely be resolved by end of 2004.

2 *See Martha Self v. BellSouth Mobility, Inc.*, 111 F.Supp. 2d 1169, 1173 (N.D. Ala. 2000).

3 Judge Ott provided Cingular with a copy of OGC's letter on September 30, 2004.

pending reconsideration proceeding and in the *Self* litigation. Given Judge Ott's desire to move his proceedings forward, by letter dated November 15, 2004 Cingular requested that OGC further clarify its position concerning the *Fourth Order on Reconsideration.* Cingular filed copies of this correspondence in the above-referenced dockets.

By letter dated December 1, 2004, plaintiff's counsel in the *Self* litigation filed a letter ("Plaintiff's Letter") responsive to Cingular's November 15, 2004 letter, reaching the opposite conclusion concerning the significance of the OGC Letter. Subsequently, on December 13, 2004, OGC responded to Cingular's November 15th letter, declining to issue the clarification Cingular requested and stating that OGC "ordinarily does not, by letter, clarify decisions of the Commission, particularly when the matter sought to be clarified is before the agency itself in an ongoing proceeding." While Cingular appreciates OGC's policy, the clarification OGC provided to Judge Ott in the above-referenced litigation concerning the Commission's 2002 and 2003 decisions in the universal service docket underscores the need for prompt Commission action on both issues raised in BellSouth's pending petition for reconsideration in that proceeding.

II. THE FIFTH CIRCUIT'S *TEXAS OFFICE* DECISION AND SUBSEQUENT COMMISSION DECISIONS DID NOT MODIFY THE *FOURTH RECONSIDERATION ORDER* PROVISIONS GOVERNING CMRS PROVIDERS' RECOVERY OF USF CONTRIBUTIONS

The OGC Letter asserts that the Commission has addressed "the second issue raised in BellSouth's petition" concerning CMRS providers' authority to recover the costs of federal USF contributions through charges associated with all of their telecommunications services – interstate and intrastate alike. Plaintiff's Letter, however, reaches the polar opposite conclusion from Cingular concerning the significance of the OGC Letter and the precedent cited therein. Plaintiff's Letter indicates that, whatever OGC's intention, no clarification was provided, thus underscoring the critical need for the Commission to promptly clarify its position with respect to the impact (if any) of the Fifth Circuit's *Texas Office* decision, the *Sixteenth Order on Reconsideration* in the Commission's universal service proceeding, and the 2002 and 2003 Orders on commercial mobile radio service ("CMRS") providers' authority to recover federal USF contributions.[4] .

Plaintiff's Letter underscores the point BellSouth made in its original petition for reconsideration: that "there is every likelihood that litigation such as the [*Self* case] will be

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[4] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999); *Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262*, 15 F.C.C.R. 1679 (1999); *Federal-State Joint Board on Universal Service*, 17 F.C.C.R. 24952 (2002) ("*2002 Order*"), *aff'd* 18 F.C.C.R. 1421 (2003) ("*2003 Order*"). To confirm, Cingular also has pending before the Commission (filed by BellSouth Corporation on behalf of Cingular's predecessor in interest) a request for refunds of USF contributions assessed on Cingular's intrastate end user telecommunications revenues, which is contingent on the Commission's resolution of BellSouth's pending petition for reconsideration of the *Sixteenth Order on Reconsideration.*

spurred by the Fifth Circuit's decision, citing that decision for the proposition that CMRS carriers were without legal authority to recover federal universal service costs from intrastate services."[5] Plaintiff's Letter also raises significant issues concerning the Commission's authority under Section 332(c)(3) of the Act.

As a threshold matter, Plaintiff's assertion that the *Texas Office* court "struck down the FCC's decision in the" *Fourth Order on Reconsideration*[6] is simply incorrect. It was the Commission's original 1997 *Report and Order – not* the *Fourth Order on Reconsideration* – that was before the *Texas Office* court and where the Commission initially included intrastate revenues in the federal USF contribution base.[7] Plaintiff's error, like its underlying argument, suggests a connection that does not exist between the *Texas Office* court's reversal of the Commission's initial universal service contribution methodology and the *CMRS* cost recovery provisions of the *Fourth Order on Reconsideration*, which was unaffected by the court's ruling. The Commission's determination in the *Fourth Order on Reconsideration*, that "[b]ecause section 332(c)(3) of the Act alters the 'traditional' federal-state relationship with respect to CMRS by prohibiting states from regulating rates for intrastate commercial mobile services, allowing recovery through rates on intrastate as well as interstate CMRS services would not encroach on state prerogatives," and therefore that "CMRS providers [may] recover their contributions through rates charged for *all* their services" has never been reversed either in court or by the Commission.[8]

Moreover, Plaintiff's Letter has confused the distinction between the Commission's USF contribution requirement and its policies concerning carriers' rights and abilities to recover those costs from their customers. In fact, the two issues implicate fundamentally different statutory provisions. As the Commission and the Fifth Circuit have made clear, carriers' USF contribution obligations are based on the Commission's authority to fund federal USF programs under

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5 *See* BellSouth Petition at 16.

6 *See Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 5317, 5489 ¶ 309 (1997) ("*Fourth Order on Reconsideration*").

7 *See* BellSouth Petition for Reconsideration in CC Docket Nos. 96-45 and 96-262, at 13-14, n.43 (filed Dec. 6, 1999). Plaintiff's letter asserts that the *Fourth Recon Order* "purported to allow *all* telecommunication carriers to assess contributions for schools, libraries and rural health care based on both interstate and intrastate revenues beginning January 1, 1998." Plaintiff's Letter at 2. It is the Commission, not carriers, that assesses contributions for universal service programs. In any event, the Commission's decision to assess contributions based on both intrastate and interstate revenues and the January 1, 1998 effective date of the program was made in the original *Report and Order*, not the *Fourth Order on Reconsideration.*

8 *See Fourth Order on Reconsideration* ¶ 309. If a state commission or court were to compel a carrier to restructure its rates and ratemaking methodology as Plaintiff advocates, it would unquestionably constitute preempted rate regulation under Section 332(c)(3). *See* Amicus Curiae Brief of the Federal Communications Commission in *Cellco Partnership, d/b/a Verizon Wireless, et al. v. Mike Hatch*, No. 04-3198 (8th Cir. filed Nov. 12, 2004) (citing *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19908 (1999)). In the *Southwestern Bell Mobile Systems* decision the Commission found that states "may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers." *See also Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, ¶ 12 (2000) ("judicial action can constitute state regulatory action for purposes of Section 332").

Section 254(d) of the Act. With respect to most carriers' intrastate rates and revenues, this authority is circumscribed by Section 2(b)'s jurisdictional limits on Commission regulation of intrastate services. With respect to *CMRS providers' rates*, however, the Commission's jurisdiction is plenary under Section 332(c)(3) of the Act, which explicitly carves out an exception to Section 2(b). While the *Texas Office* court and the Commission in the *Sixteenth Order on Reconsideration*, as Plaintiff's Letter asserts, did address carrier cost recovery, they did so only in regard to ILECs' recovery of contributions via intrastate access charges.[9]

There are two other important ways that these orders and the OGC Letter undermine the arguments in Plaintiff's Letter. First, as OGC points out, in the 2002 and 2003 Orders the Commission imposed new, prospective restrictions on the amounts of USF surcharges that all carriers, including CMRS carriers, could pass through to their customers.[10] In doing so, the Commission made clear that CMRS carriers' recovery charge for each individual customer did not have to be based on that customer's own individual interstate usage.[11] Instead, the Commission permitted each CMRS carrier to apply the interstate factor used for its USF assessment (either the generic safe harbor or a company-specific factor) to the total amount of telecommunications charges on each bill to arrive at a maximum permissible recovery charge for that customer – *irrespective of the customer's actual interstate usage*.[12] The Commission's discussion assumes that such aggregated recovery charges unquestionably would have been permissible under the earlier, less restrictive rules.

Second, Plaintiff's Letter inaccurately suggests that the 2002 and 2003 Orders' linkage between interstate assessment factors and permissible recovery charges was somehow tied to the *Texas Office* jurisdictional restrictions. In fact, the *Texas Office* case is nowhere mentioned in the 2002 and 2003 Orders. The recovery restrictions in the 2002 and 2003 Orders were designed to "increase transparency and decrease confusion for consumers about the amount of universal service contributions that are passed through by carriers."[13] There was no jurisdictional component to the Commission's discussion. Thus, Plaintiff's Letter reads far too much into these cases and OGC's discussion of them.

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9 *See* BellSouth Petition at 13-15, nn 43-44.
10 *2002 Order* at ¶ 40.
11 *2003 Order* at ¶ 8.
12 *Id.*
13 *2002 Order*, ¶ 2.

CONCLUSION

For the foregoing reasons, the Commission should expeditiously resolve the issues pending in BellSouth's petition for reconsideration and, in particular, confirm that CMRS providers are entitled to recover federal USF contributions through rates for all their telecommunications services, including intrastate services.

Respectfully submitted,

/s/ L. Andrew Tollin

L. Andrew Tollin